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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JEREMY HOCKENSTEIN,

4 Plaintiffs,

5 v.

22 Civ. 4046 (ER)

6 CIGNA HEALTH and LIFE
7 INSURANCE COMPANY,

8 Defendants.

Teleconference

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9 New York, N.Y.
10 October 21, 2022
10:00 a.m.

11 Before:

12 HON. EDGARDO RAMOS,

13 District Judge

14 APPEARANCES

15 POSNER LAW, PLLC
Attorneys for Plaintiffs
16 BY: GABRIEL POSNER

17 MCDERMOTT WILL & EMERY
Attorneys for Defendants
18 BY: DMITRIY TISHYEVICH
19 RICHARD DIGGS
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(Case called; appearances noted)

THE COURT: Good morning to you all. This matter is on for a premotion conference. I note for the record it is being conducted by telephone. I know that we are here at the request of defendant, but I believe this is the first time that the parties have appeared before me in this matter.

So, Mr. Posner, let me begin with you. Tell me what this case is about.

MR. POSNER: Thank you, your Honor.

In this case plaintiff brings claims for himself and on behalf of putative class members alleging that defendant violated ERISA, the Employee Retirement Income Security Act 1974. More specifically, plaintiff obtained Covid tests from a healthcare provider and submitted a claim for reimbursement to Cigna, and Cigna denied full reimbursement of those Covid tests allegedly in violation of federal statutes and the terms of plaintiff's ERISA governed healthcare benefits plan.

In particular, plaintiff alleges that Cigna should determine the claims are reimbursed. Cigna should provide a disclosure that is reasonably comprehensible of its claims determination. And when plaintiff submitted an internal appeal to Cigna, Cigna adhered to its claims denial, and thereto plaintiff alleges Cigna should provide a full and fair review as required by ERISA and ERISA plan documents at issue.

THE COURT: Mr. Tishyevich.

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1 MR. TISHYEVICH: Good morning, your Honor. I'm not
2 planning on speaking too long, but if it's okay with you I'll
3 just give you a high-level overview of what our proposed motion
4 to dismiss would look at and to talk about how that would
5 effect the scope of the case giving that we're not proposing to
6 dismiss the ERISA benefits claim.

7 THE COURT: Okay.

8 MR. TISHYEVICH: Mr. Hockenstein alleges high-level
9 that Cigna did not properly reimburse him and his dependents
10 for Covid tests that they received, and so he brought a number
11 of claims under ERISA on behalf of himself and also on behalf
12 of several of the proposed classes.

13 A few weeks ago Cigna filed a letter to request this
14 conference and plaintiff filed his response. And after reading
15 those letters, it became apparent to me that the parties were
16 apparently talking pass each other at least to some extent. As
17 Mr. Posner mentioned, there's a claim alleging a breach of a
18 full and fair review. And Cigna proposed moving to dismiss
19 that claim, and also the claim for failure to provide adequate
20 notice of an adverse claim determination; because those
21 obligations comes from ERISA Section 503. But Section 503 only
22 applies to plans, and Cigna itself is not the plan.

23 So in our response, plaintiffs clarified that they are
24 not bringing these claims under Section 503 directly, and
25 instead they're bringing them through Section 502(a)(3). But

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1 even with that clarification, Cigna's view is those claims
2 should still be dismissed. And here's why. The Supreme Court
3 has been very clear that Section 502(a)(3) acts as safety net
4 to provide equitable relief for ERISA injuries when there's no
5 other adequate remedy. That's what the Supreme Court said in
6 1996 in *Varity Corporation v. Howe*, 516 U.S. 489.

7 It said, "Where Congress also provided adequate relief
8 for a beneficiary's injury, there will likely be no need for
9 further equitable relief, in which case such relief normally
10 would not be appropriate." And that's from page 515 of the
11 decision. In that case, for example, the Supreme Court found
12 that equitable relief was appropriate because the plan at issue
13 no longer existed. And so plaintiffs could not have brought an
14 ERISA benefits claim, and they could only obtain a relief
15 through a Sections 502(a)(3) claim, but that's not the case
16 here.

17 The Second Circuit has also made it clear that after
18 *Varity*, Section 502(a)(3) claims are not appropriate when
19 there's another avenue for relief, and that was in a case
20 called *Frommert v. Conkright*, 433 F.3d 254 from 2006.

21 So in that case the Second Circuit said, citing *Varity*
22 that the Supreme Court has "consistently disfavored the
23 expansion of the availability of equitable relief where
24 remedies of law are sufficient." So that's from page 270.

25 Your Honor, these cases stand for a simple

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1 proposition. If a plaintiff is able to obtain relief for an
2 alleged ERISA injury through some provision of ERISA outside of
3 Section 502(a)(3), it is not appropriate to provide that relief
4 through Section 502(a)(3). But that's exactly what
5 Mr. Hockenstein is trying to do here.

6 He argues that Cigna violated Section 502(a)(3) by
7 failing to provide full and fair review of his claims and to
8 provide him with adequate notice of his benefit denials as
9 required by Section 503. But, he already has a perfectly
10 adequate avenue to challenge dishonest conduct, which does not
11 require relying on Section 502(a)(3). And that's to bring a
12 Section 503 claim for lack of full and fair review or for lack
13 of adequate notice directly against his plan.

14 So given that Mr. Hockenstein already has other
15 avenues to pursue these claims, it's not appropriate for him to
16 pursue them under Section 502(a)(3). That's one problem with
17 these claims. Separately, there's another problem for these
18 Section 502(a)(3) claims. They very clearly seek money
19 damages, which is not a relief that's available under Section
20 502(a)(3).

21 Again, the Supreme Court has made this very clear in a
22 case from 2002 called *Great-West Life & Annuity Insurance Co.*
23 *v. Knudson*, 534 U.S. 204. So here's what the Supreme Court
24 said in how you distinguish between equitable relief, which is
25 addressable under 502(a)(3), versus legal relief, which is not.

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1 The Supreme Court said "A claim for money due and owing under a
2 contract is quintessentially an action at law."

3 And then it says, "Almost invariably, suit seeking,
4 whether by judgment, injunction or declaration to compel the
5 defendant to pay a sum of money to the plaintiff are suits for
6 money damages, as that phrase has traditionally been applied,
7 since they seek no more than compensation for loss resulting
8 from the defendant's breach of legal duty, and money damages
9 are, of course, the classic form of legal relief." That's from
10 page 210 of the decision. And here, your Honor, the complaint
11 makes it very clear that money damages, meaning legal relief,
12 is exactly what Mr. Hockenstein is trying to recover through
13 his Section 502(a)(3) claims.

14 I'll give your Honor just one example, which is Count
15 One on page 17 of the first amended complaint. Count One is
16 literally titled "Reimbursement for Covid tests." That is money
17 damages. No question about it. And paragraph 73, one of the
18 first paragraphs in this Count One again make this very clear.
19 It says, "Plaintiff and each member of the reimbursement
20 classes is entitled to full reimbursement for the cost of
21 diagnostic COVID-19 test."

22 So plainly what Mr. Hockenstein is seeking is to be
23 paid more for his Covid tests, but that kind of reimburse is
24 the not equitable relief at Section 502(a)(3) allows. That is
25 just straight money damages. And we cited a number of cases on

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1 page three of our letter where courts dismissed Section
2 502(a)(3) claims because those claims are effectively seeking
3 money damages, because those claims are legal and not
4 equitable.

5 And one last point, your Honor. As we said in the
6 letter, Cigna is not moving to dismiss the ERISA benefits
7 claim. And you may be wondering, Why bother moving to dismiss
8 the Section 502(a)(3) claims since some portion of this case is
9 going to go forward anyway. But I do think that the outcome of
10 this motion is going to potentially having a meaningful impact
11 on the case. Because if Cigna prevails on this motion, then
12 all that's left is the ERISA benefits claim.

13 And if we're just dealing with this case as a pure
14 ERISA benefits denial, that is going to significantly effect
15 the scope of discovery, because discovery will then very likely
16 be limited to just the administrative record. And Mr. Posner
17 and I already had a preliminary discussion about discovery
18 impact. He had the view that it makes sense to stay discovery
19 pending the outcome of Cigna's motion, and I fully agree, of
20 course assuming that's acceptable to your Honor.

21 Because the alternative would be to start discovery on
22 the ERISA benefits claim while the other claims are up in the
23 air given the motion to dismiss, which just does not seem
24 parity efficient. With that, I just want to thank you for your
25 time. I'm happy to address any questions you may have.

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1 Otherwise I'll turn it over to Mr. Posner to respond.

2 THE COURT: Mr. Posner, I'll give you an opportunity
3 to respond briefly.

4 MR. POSNER: I follow everything Mr. Tishyevich is
5 saying and the leading cases that he cited to, *Varity Corp.*,
6 and *Great-West Life* and so on. Based on Mr. Tishyevich is
7 saying, plaintiff were to pose the motion, it's a bit of a
8 pivot for Cigna. This is not really what they focused on in
9 their premotion letter.

10 But if their briefing were to lay out the arguments
11 Mr. Tishyevich just made, plaintiff would oppose the motion to
12 broadly -- if I understand the argument as it's now presented,
13 plaintiff's ERISA 502(a)(3) claims are duplicative of the
14 502 a)(1)(B) claims. And that argument, as I read the cases,
15 should not be accepted by the Court on a motion to dismiss.

16 The Second Circuit has held quite explicitly that a
17 plaintiff can allege at the motion to dismiss phase, which is
18 where we are, a plaintiff can allege both claims under Section
19 502(a)(3) and 502(a)(1)(B). There's a potential reason why we
20 need both. If Cigna's conceding liability for a nationwide
21 class under Section 502(a)(1)(B), sure. We don't need
22 duplicative recovery, but they're not doing that. But to
23 dismiss the 502(a)(3) claims now and then go talk about whether
24 or not there's liability under 502(a)(1)(B), the alternative
25 provision, I don't understand that approach. Cause if

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1 plaintiff losses on 502(a)(1)(B), we may very well have needed
2 the 502(a)(3) claim.

3 THE COURT: Mr. Posner, what about Mr. Tishyevich's
4 argument that 502(a)(3) does not allow for the recovery of
5 equitable damages?

6 MR. POSNER: It happens to be the same Second Circuit
7 decision, *New York State Psychiatric Association*, which I think
8 we all agree is the current leading Second Circuit case. Cigna
9 also cites to that case in their letter, and I cite to it quite
10 a bit. There too I quote on page three of my letter, there's a
11 block quote from that decision that says, A court order
12 compelling a defendant to pay cash that derives from a breach
13 of a fiduciary duty is an equitable remedy, and that's a
14 surcharge or there's other -- we can get into that in the
15 briefing what the traditional rules of equity say about that.

16 But the key words in the quote Mr. Tishyevich quoted
17 from *Great-West Life* was that, Money payment resulting from the
18 breach of a legal duty. And the question here is, Was there a
19 breach of damages at a law. Was it a legal duty or was it an
20 equitable duty that Cigna had. And there could be very
21 important reasons why we need that equitable claim. It's not
22 clear to me that there's a provision in the plan as it
23 currently exists that would require Cigna to compensate Covid
24 tests in full. That's in a federal statute, not in ERISA
25 itself. It's in a parallel federal statute.

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1 So the idea that Cigna violated another law, the CARES
2 Act, that could be where the equitable remedy, the equitable
3 duty and remedy comes in. And to say under 502 -- all they
4 claim is under 502(a)(1)(B), Did Cigna violate terms of the
5 plan. Cigna is going to whip out the plan and say, Where does
6 it say anything in here about Covid plans. It doesn't, so we
7 didn't violate the plan.

8 I don't think that would be very -- they're dodging
9 their duty as a fiduciary. They must comply with the law. Not
10 just with ERISA, but with the law generally. They can't violate
11 laws and how they handle the plan. In terms of answering your
12 Honor's question point blank. My response to Mr. Tishyevich's
13 point about whether or not we're seeking money. The answer to
14 that appears on page three of my premotion letter. The Second
15 Circuit has said requesting money that arises out of a breach
16 of fiduciary duty, which is what we allege here, can be
17 equitable remedy recoverable under Section 502(a)(3).

18 THE COURT: Okay. Onward we go. Mr. Tishyevich, you
19 will be permitted to make your motion. It will be done on the
20 following schedule. Your motion will be due on, I'd say three
21 weeks, but November 11 is Veteran's Day, so Monday November
22 14th. Mr. Posner your response will be due three weeks later,
23 December 5. And Mr. Tishyevich, your response or your reply
24 will be due one week later on December 12. So you have the
25 schedule.

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Mr. Posner, is there anything else we should do today?

MR. POSNER: Your Honor, Mr. Tishyevich just mentioned that we are -- the parties are in agreement that we should stay discovery on the rest of the case, and that's fine with me, as long as it's clear to everyone, nobody's waiving any rights with respect to that. After the motion, we'll see where things stand, and then we'll take up what we need to do in terms of discovery.

THE COURT: I take it you have no objection to that, Mr. Tishyevich. And it seems fair to me that no one is waiving any rights by implementing a stay of discovery pending the resolution of your motion?

MR. TISHYEVICH: No objections.

THE COURT: Very well. Anything more from you, Mr. Tishyevich?

MR. TISHYEVICH: Nothing from me.

THE COURT: Okay. In that event, we're adjourned. Everyone please stay well.

(Adjourned)